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The ACA and Collective Bargaining: Smart Negotiations

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June 11, 2013



Affordable Care Act (ACA) for Unionized Employers: *Overview of the Challenge*

ACA

- Provide ACA-compliant healthcare benefit package
 - Requires specific benefits
 - Mandates plan features
- Coverage must be provided for all FT employees (30 hours)
- Benefits must be made available to FT employees within 90 days
- **Effective January 1, 2014, even if midterm in CBA**

Substantial financial penalties for failure to meet ACA requirement

NLRA

- Bargain over terms and conditions of employment
 - Health benefits are a mandatory topic of bargaining
- Existing CBA dictates employment terms/conditions, absent union agreement
- Very limited ability to make unilateral changes to employment terms/conditions

NLRA and/or contract violations if unilateral changes made

The Basic Requirements – ACA

- Employer Mandate (1/1/2014)
 - Assume all employers on the phone have 50 or more FTEs
 - Offer FT employees “Minimum Essential Coverage” or pay a penalty based on all FT employees
 - Offer FT employees “Minimum Essential Coverage” that provides “Minimum Value” and is “Affordable,” or pay a penalty based on certain FT employees
- Plan Mandates (2011-2018)
 - Employer-based coverage must meet certain rules
 - Excise tax on high-value coverage in 2018 (“Cadillac Tax”)
- Individual Mandate (1/1/2014)
 - Individuals must have Minimum Essential Coverage or pay a penalty unless available Minimum Essential Coverage is not Affordable
 - Coverage can be purchased on health insurance exchanges

The Basics Requirements– *NLRA/Duty to Bargain*

- **Section 8(a)(5)** prohibits employers from making unilateral changes in terms and conditions of employment without union agreement
 - Requires bargaining over mandatory subjects
 - Mandatory subjects includes healthcare
 - Limited exceptions –
 - *Lawful bargaining impasse*
 - Employers may unilaterally implement once impasse has been reached in negotiations
 - Difficult standard highly scrutinized by NLRB
 - *Waiver – Must be “clear and unmistakable”*
 - *Changes required by law*
 - Must be specific (non-discretionary) changes mandated by law
 - Employers required to bargain only over effects of such changes – how the changes affect terms/conditions

The Basics Requirements – *NLRA/Duty to Bargain*

- **Section 8(d)** prohibits employers from making unilateral changes in the terms of a CBA while in effect.
 - Employer bound by terms of CBA
 - Limited exceptions – Permitting mid-term CBA changes...but only after bargaining:
 - *Mid-term contract re-openers*
 - Specific CBA provisions that call for opening of contract
 - Usually triggered by specified event and/or mutual agreement
 - May be a limited or full re-opener
 - *Mid-term changes required by new circumstances*
 - Triggered by circumstances not contemplated in existing CBA
 - Could include changes in law
 - Generally cannot change economic terms (e.g., wages or benefits)
 - Zipper Clause may allow union to refuse to bargain over changes
 - *Changes required by law*
 - If mandatory change, bargain over effects
- **Grievance/Arbitration Provisions** in most CBAs provide enforcement against employer changes that violate terms of CBA

Key Points – ACA and Collective Bargaining

- ACA versus CBA
 - ACA mandatory requirements trump CBA provisions
 - ACA employer obligations/penalties start regardless of when CBA expires
- Mandatory/Non-Discretionary ACA Requirements
 - Employers need not get agreement with union to implement
 - Bargaining required over effects of the changes
- Mandatory/Discretionary ACA Requirements
 - Employers must bargain over ACA discretionary requirements
- Penalties are solely on employer
 - Likely to create bargaining leverage against employer
 - *Union may withhold agreement*
 - *Union may refuse to bargain mid-term (e.g., Zipper Clause)*

Key ACA Bargaining Issues

- Complying with the ACA Employer Mandate
 - Meeting shared responsibility RULES
 - Adopting changes necessary for ACA-compliant health plan
 - *Plan design*
 - *What benefits to offer*
 - *At what cost*
- Ensuring Coverage
- Ensuring Eligibility
- Allocation of additional ACA costs

Complying with Employer Mandate – Employer Penalties

No Coverage Penalty	Inadequate Coverage Penalty
<p>If employer does not offer Minimum Essential Coverage to at least 95% of its FT employees and dependents (dependents means children up to age 26, but not spouses)</p>	<p>If employer offers minimum essential coverage to at least 95% of its FT employees and their dependents, but the coverage is not Affordable and/or does not provide Minimum Value</p>
<p>AND</p> <p>One full-time employee enrolls in an exchange <u>and</u> receives a subsidy</p>	
<p>Employer must pay penalty of:</p> <p>\$2,000 (\$166.67/month) for <u>all</u> FT employees (less 30) (including those receiving Minimum Essential Coverage)</p>	<p>Employer must pay penalty of:</p> <p>\$3,000 (\$250/month) for each FT employee receiving a subsidy (but not to exceed the No Coverage Penalty)</p>

ACA-Compliant Plans – Minimum Essential Coverage

Necessary to avoid No Coverage (\$2,000) penalty

- Coverage constitutes Minimum Essential Coverage if it is under an “eligible employer-sponsored plan”; no particular level or type of benefits, but must meet any applicable plan mandates, e.g.:
 - No annual or lifetime limits
 - No waiting periods in excess of 90 days (2014)
 - No cost-preventive services (in most cases), etc.
- Plan can be insured/self-insured, but not excepted benefits (e.g., certain dental/vision, fixed indemnity, etc.)
- Multiemployer plan qualifies

ACA-Compliant Plan – Minimum Value

Necessary to avoid Inadequate Coverage (\$3,000) penalty

- Minimum Essential Coverage is not the same as Minimum Value
- Generally plan must cover at least 60% of total allowed costs in four core categories of benefits:
 - physician and mid-level practitioner care,
 - hospital and emergency room services,
 - pharmacy benefits, and
 - laboratory and imaging services
- Likely can be determined by design-based safe harbor, calculator, or actuarial certification
 - Minimum Value Calculator has been issued:
<http://www.cms.gov/CCIIO/Resources/Regulations-and-Guidance/Downloads/mv-calculator-methodology.pdf>

ACA-Compliant Plan – Affordable

Necessary to avoid Inadequate Coverage (\$3,000) penalty

- Ensure contribution for employee-only coverage is less than 9.5% of household income
 - Required contribution for spouses/dependents may be more
- Since household income will not be known to the employer, three safe harbors have been proposed:
 - W-2 Safe Harbor – Contribution cannot exceed 9.5% of the employee's W-2 wages from the employer for the year
 - Rate of Pay Safe Harbor – Contribution cannot exceed 9.5% of the employee's hourly rate of pay (or monthly salary) at the beginning of the coverage period
 - Federal Poverty Line Safe Harbor – Contribution cannot exceed 9.5% of an amount equal to the federal poverty line for the year divided by 12 (For 2013 – \$90.96/month)

ACA-Compliant Plan – New Plan Mandates

All Plans

Plan Mandates

- Age 26 dependent coverage
- No lifetime limits and restricted annual limits
- No rescissions
- No preexisting condition exclusions (under age 19)
- No reimbursement from FSAs/HSAs/HRAs for OTC drugs

- Uniform explanation of coverage (SBCs)
- 60 day advance notice of material modifications
- W-2 reporting of value of health coverage

- \$2,500 cap on employee contributions to FSAs
- PCORI fee - \$2 per member
- Notice of exchange/premium assistance (delayed)

- Waiting periods limited to 90 days
- No preexisting condition exclusions
- No annual limits
- Employer reporting coverage to IRS
- Reinsurance fee – \$63 per member

- Automatic Enrollment
- Nondiscrimination requirements for insured plans (2014?)
- Cadillac Tax

2011

2012

2013

2014

TBD

2018

Non-Grandfathered Plans

Additional Plan Mandates

- No cost sharing for preventive care
- Choice of primary care physician in-network
- Direct OB/GYN services without referral
- Internal and external claims-review procedures
- Emergency services without pre-authorization at in-network rates

- Limits on cost sharing/deductibles
- Coverage required for clinical trials

ACA – Collective Bargaining Multiemployer Plans

- Multiemployer Plans
 - Under Transition Rule, group covered by a multiemployer plan meets employer shared responsibility requirement if coverage is good enough and cheap enough for all
- There is a lack of control and coordination problem where coverage is offered through a multiemployer plan
 - Can you require the multiemployer plan to certify “Good Enough” Coverage?
 - Can you require the multiemployer plan to indemnify the employer?

Employer Mandates/ACA-Compliant Plans – Bargaining Implications

- “Pay or play” decision (whether to provide health insurance)
 - Must bargain over “pay or play” decision that changes existing coverage
 - Likely no bargaining obligation over “pay” decision for employees without existing CBA coverage
- If employer required under CBA to provide health benefits –
 - Specific minimum health benefit changes required to make plan ACA compliant do not need union agreement before implementing
 - Only bargain effects of mandatory changes
 - Examples of required changes:
 - *Minimum value coverages*
 - *Lifetime/annual limits*
 - *Mandatory automatic enrollment*
 - *Preexisting conditions exclusions*
 - *Preventive care provision (non-Grandfathered only)*
- Bargaining/Agreement with union would be required before changes such as –
 - Coverage for those bargaining unit employees currently not receiving health benefits
 - Discretionary items –
 - *Wellness incentive*
 - *Benefits greater than minimally required by ACA*
 - *Ancillary benefits not mandated by ACA (certain dental and vision)*
- “Affordability” Safe Harbors

Coverage – Full-Time Employees

- Penalties based upon FT employees of each controlled group member separately (not on a controlled group basis)
- FT Employee averages 30 hours of service/week (PT employees excluded)
 - *For non-hourly employees, 8 hrs./day or 40 hrs./week*
 - *130 hrs./month can be used*
 - Different from large employer determination
 - *Determined on a controlled group basis*
 - *No special rules combining PT employees*
- Determination of FT status
 - Monthly, ongoing basis
 - *Administratively difficult and unpredictable for variable-hour employees whose FT status is unknown*
 - *What happens if an employee changes from full-time to variable hour?*

Coverage – Full-Time Employees

- Safe harbor method for variable-hour employees
 - *Permits employers to calculate employee hours during a measurement period (3-12 months) and lock in the resulting status for the following stability period (6-12 months)*
 - *Employer can define periods, subject to consistency based on categories of employees (salaried/hourly, union/non-union, different entities, different states)*
 - *May be complicated to track and implement*

Coverage – Part-Time Employees

- If PT employees (< 30 hours/week) are covered, plan must meet applicable plan mandates
- No requirements applicable to “excepted benefits” (e.g., certain dental and vision benefits)
- No Shared Responsibility requirement, so can pass through to employees additional cost of compliance, but this may cause the loss of Grandfathered status

Coverage – Bargaining Implications

- Bargaining/union agreement required regarding coverage issues –
 - Changes in FT vs. PT definitions
 - Coverage changes
- Bargaining over which safe harbor method (measurement/stability periods and employee categories to be used) –
 - Some argue the safe harbor selection is not subject to bargaining
 - Must bargain if method will change any bargaining unit employee's eligibility

Eligibility

- Eligibility waiting period cannot be longer than 90 days from date of hire, except
 - Initial eligibility can be based on substantive criteria, not the passage of time (i.e., Job Classification, Licensure, Part-Time)
 - Cumulative hours eligibility threshold is permissible – may require up to 1,200 hours
 - Special Variable-Hour Rules

Eligibility – Bargaining Implications

- For existing CBA waiting periods not meeting new ACA requirements
 - Mandatory change
 - Must bargain over the new waiting period to be adopted
 - Should be able to implement if union unwilling to bargain and/or agree
- “Eligibility” based on calendar month hour requirements may be problematic

Allocation of Costs

- ACA is going to impose additional costs:
 - Coverage Mandates
 - Additional covered people
 - Fees (PCORI and Temporary Reinsurance)
 - Reporting Requirements
 - Cadillac Tax
 - *40% excise tax on health plan benefits above threshold amount (threshold is \$10,200 (single)/\$27,500 (family) indexed to CPI-U)*
- In almost all cases, these costs cannot be shifted to employees absent agreement with the union

Questions?

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